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Supreme Court, U.S.
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No. 00-997

IN THE

Supreme Court of the United States

ERIC SCHMIDT, PAUL SCHMITZ, MICHAEL O'KEEFE, SR., and GARY BENNETT,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Government suggests that whether the prosecutor's duty to correct false evidence applies to false testimony by a prosecution witness on cross-examination is not a question (i) that has divided the circuits, or (ii) that is presented by the Court of Appeals' decision in this case. Br. Opp. 9-11. As discussed below, the Government is wrong on both points: there is a conflict in the circuits on this question; and the question is presented by the Court of Appeals' decision. Because the Government does not deny that the question is important, certiorari should be granted to resolve the conflict.

1. There Is a Conflict Among the Circuits.

Citing decisions of the Fourth Circuit and the District of Columbia Circuit, the Government asserts:

> [T]he courts of appeals have held that a defendant's due process rights are violated if a critical government witness testifies falsely, *either on direct or on cross-examination*; the prosecutor does not correct the false testimony; and there is a reasonable likelihood that the false testimony affected the outcome of the trial.

Br. Opp. 10 (emphasis added). The Government has not accurately summarized the case law in the courts of appeals.

Most courts of appeals have held that the prosecutor's duty of correction applies to false testimony of a prosecution witness on cross-examination (*see* Pet. 14-15), but the Fifth Circuit in this case, and the Ninth Circuit in *United States v. Aichele*, 941 F.2d 761, 766 (9th Cir. 1991), have held to the contrary. The Government relied upon *Aichele* in appealing

from the District Court's order granting a new trial,[1] and the Court of Appeals chose to follow that decision:

> The prosecution has a duty only to "refrain from knowingly presenting perjured testimony and from knowingly failing to disclose 'that testimony used to convict a defendant was false.'" *Aichele*, 941 F.2d at 766 (quoting *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989)). Thus, when the defense elicits the alleged perjury on cross-examination, no material falsehood has occurred because the government has not itself knowingly presented false testimony. *Id. We have adopted this position* because it is the duty of the jury to determine the credibility of the witnesses. . . .
>
> Not all falsehoods are material partially because of our concern with preserving the adversarial system: it is the prerogative of defense counsel to plan his or her cross-examination strategy, and undue clarification or interruption by the prosecution might interfere with that strategy.

Pet. App. 52a-53a (emphasis added); *see also* Pet. App. 56a ("With respect to the district court's legal conclusion of materiality, falsehoods, to the extent that any were uttered, occurred as a result of the defense's cross-examination, not from testimony elicited by the prosecution.").[2]

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[1] *See* Brief for the Appellant, The United States of America, at 33-34, *United States v. O'Keefe*, 128 F.3d 885 (5th Cir. 1997) (No. 96-31181).

[2] As the Government points out, the false testimony in *Giglio v. United States*, 405 U.S. 150 (1972), occurred on cross-examination. Br. Opp. 9-10. But to the extent that the Fifth Circuit and the Ninth Circuit considered *Giglio*, they may have concluded (incorrectly, in petitioners' view) that that decision was inapposite because it involved a witness's false denial that he had been promised he would not be prosecuted if he cooperated with the Government. *Cf. United States v. Meros*, 866 F.2d 1304, 1310 (11th Cir. 1989) ("Only in cases in which the witness' false

Thus, the Government is incorrect in suggesting that "the courts of appeals" agree a prosecutor's duty of correction applies to false testimony "either on direct or on cross-examination." Br. Opp. 10.[3]

2. Explicit Findings Establish That the False Testimony in This Case Was Not Fully Exposed.

The Government also argues that review is unwarranted because petitioners purportedly exposed the false testimony at trial. Br. Opp. (I) ("the defense exposed the witness's falsehoods during cross-examination"), 9 ("petitioners exposed the witness's false testimony at trial"). According to the Government, this case is controlled by the rule that, "[w]here the defense has fully exposed the witness's false or contradictory testimony at trial, the courts do not require the prosecutor to engage in the pointless and redundant exercise of formally correcting that testimony." Br. Opp. 10-11.[4]

The Government's argument is contrary to the record. The District Court made explicit findings, which were not questioned by the Court of Appeals, that the witness's false testimony was *not* fully exposed. Pet. App. 133a, 136a, 140a.

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testimony conceals his possible bias against the defendant have we found *Giglio*'s mandate applicable.").

[3] Nowhere in its brief in opposition does the Government say whether it agrees with the circuits that limit the prosecutor's duty of correction to falsehoods on direct examination, or with those circuits that require disclosure of falsehoods either on direct examination or on cross-examination.

[4] *See also* Br. Opp. 11 ("Donaldson's falsehoods were disclosed at trial"), 11 n.4 (arguing that the cases cited by petitioners "do not suggest, much less require, that the prosecutor must correct false testimony after the defense has already done so"), 12 (referring to "false testimony cases in which the witness's falsehoods or contradictory statements were ultimately revealed to the jury"), 12-13 ("Donaldson's falsehoods were disclosed at trial").

Indeed, it was precisely because the false testimony was not fully exposed that the District Court determined that petitioners had not received a fair trial:

> The two instances of perjury revealed at trial, though not "corrected" by the government, were explored before the jury and I believed at that time that the jury was able to make the credibility determination called for under the circumstances. The fairness of the trial was called into question, however, by the revelations at oral argument. Although defense counsel elicited admissions from Donaldson on cross-examination that were damaging to his credibility, it has become apparent after trial that *the true nature and scope of Donaldson's perjury was never disclosed or corrected by the government, or revealed on cross-examination by the defendants.*

Pet. App. 140a (emphasis added).

The District Court found that there had been *four* instances of perjury, and that only *two* had been revealed at trial. Pet. App. 133a ("[F]our instances of perjury by Charles Donaldson have been revealed to date. Two of the acts of perjury were revealed during trial."). As the court explained, it was only after the trial that important instances of perjury came to light:

> [A]t oral argument on defendants' post-trial motions, the startling revelation was made by the government lawyers that Donaldson's perjury was not that which seemingly was revealed at trial four months earlier:
>
> > THE COURT: All right. But, is there any question in your mind, Mr. Boitmann, that Mr. Donaldson did, in fact, commit perjury?
> >
> > MR. BOITMANN: I have to answer that by answering: Yes, but not the perjury that everybody has been talking about.

> THE COURT: Oh, there's some other perjury?
>
> Mr. Boitmann then explained that it was the government's position that Donaldson lied on the witness stand at this trial by testifying that he had ever told the FBI agent that O'Keefe had altered the BCI minutes.

Pet. App. 136a.

The District Court found that the witness's false testimony that had not been exposed at trial included his critical lie that the Government was learning for the first time at trial that he had previously made a false accusation against petitioner O'Keefe.[5] That lie was never revealed at the trial. At the time the defense did not know of its falsity, and the Government—which did know—was not telling. As the District Court found,

> [T]he prosecutors sought to preserve their own image by failing to correct Donaldson's testimony, elicited on cross-examination, that the government did not learn of his perjury until during trial. Regardless of the circumstances urged by the government, this testimony conveyed a false impression that the government was in no manner apprised of Donaldson's misconduct.

Pet. App. 145a.[6] Not until after trial was it revealed that Donaldson had lied in testifying that the Government had

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[5] *See* Pet. App. 138a (finding by the District Court that the witness "was not testifying truthfully when he denied that the government had knowledge of his perjury prior to trial"), 38a n.2 (acknowledgment by the Court of Appeals that the District Court had "found that Donaldson uttered a falsehood when he stated that the government did not know, prior to trial, that he had lied concerning altering the minutes").

[6] *See also* Pet. App. 145a (finding that the prosecution had engaged in "an effort to mislead defense counsel in their preparation for trial, to cover up Donaldson's conduct and thereby salvage his credibility, and to protect the credibility of the prosecution itself").

been unaware of his false accusation against petitioner O'Keefe. *See* Pet. App. 137a-138a. The prosecutors managed, as the District Court said, "to preserve their own image"—thereby illegitimately increasing their standing with the jury and the likelihood of the conviction that in fact occurred. This was of great significance in a case in which, as the Court of Appeals noted in its most recent opinion, the defense's version of the acts alleged to be criminal "is not wholly implausible." Pet. App. 12a.[7]

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[7] The Government stresses that defense counsel "argued to the jury that the witness was thoroughly impeached." Br. Opp. 9. In *Napue v. Illinois*, 360 U.S. 264 (1959), this Court rejected a similar effort to save a conviction in the face of proof that false testimony by a prosecution witness had not been disclosed or corrected. *See id.* at 270 ("[W]e do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one.").

Defense attorneys frequently argue that prosecution witnesses have been proven unworthy of belief, but here the Government's calculated silence prevented the defense from providing the jury with important additional evidence that would have impeached, not just this one witness, but the Government's entire case. That additional evidence would have been especially significant because, as the District Court found, "the other key government witness" (Johnny Moore) gave "consistently contradictory testimony," Pet. App. 150a, and both Donaldson and Moore had "exchanged their testimony for reduced charges and favorable recommendations by the government at sentencing." Pet. App. 69a (footnotes omitted). Proof that the Government had put Donaldson on the stand despite knowledge that he had lied, and without disclosing or correcting the lie, could well have led the jury to reject the testimony of both Donaldson and Moore, for Moore also stood to save himself prison time by pleasing the Government with his testimony.

Also misplaced is the Government's reliance (Br. Opp. 11) upon the general jury instructions about judging the credibility of witnesses, which explained that a witness may be impeached by showing his testimony concerning a material matter was false, and that the testimony of those testifying for personal advantage should be examined with great care. *See*

The Court of Appeals did not question any of these findings by the District Court. In fact, the Court of Appeals itself acknowledged that only some of the false testimony had been exposed, when the Court of Appeals stated that "the falsehoods were *sufficiently* exposed before the jury to enable the jury to weigh those falsehoods in its deliberations." Pet. App. 57a (emphasis added).

The unquestioned findings by the District Court, establishing that the witness's false testimony had not been fully exposed, were what led the Court of Appeals to address, at the threshold of its analysis of what lies are material for due process purposes, the status of lies on cross-examination. Pet. App. 52a-53a. It was only after the court held that "when the defense elicits the alleged perjury on cross-examination, no material falsehood has occurred," Pet. App. 52a, that the court turned to the falsehoods in this case. Pet. App. 54a-59a.[8] And in analyzing those falsehoods, the court emphasized that they occurred on cross-examination. Pet. App. 56a ("With respect to the district court's legal conclusion of

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Record on Appeal, No. 96-31181, vol. 31, pp. 111-13. Such instructions were not remotely comparable to revealing that the Government had known before trial that Donaldson had lied, and had nonetheless called him to testify without disclosure or correction of the lie.

[8] It is instructive to examine how the Government itself characterized the decision reversing the grant of a new trial, when the Government later applied to the Court of Appeals for a writ of mandamus to preclude the District Court from conducting an *in camera* review of FBI 302 reports and other materials. Pet. App. 162a-163a. The Government clearly understood the Court of Appeals' basic holding to have been that the falsehoods were not material because they occurred on cross-examination. *See* Application of the United States of America for Writ of Mandamus, at 4-5, *In re United States of America* (5th Cir.) (No. 98-30652) ("The Court found no Due Process violation. The Court did not address the question of whether Donaldson committed perjury. Instead, it concluded that any perjury that occurred was not 'material,' because it did not occur as part of the prosecution's own case, but rather occurred as a result of the defense's cross-examination. [*O'Keefe*, 128 F.3d] at 894, 895.").

materiality, falsehoods, to the extent that any were uttered, occurred as a result of the defense's cross-examination, not from testimony elicited by the prosecution.").

3. The Government Does Not Deny That the First Two Questions Presented in the Petition Are Important.

Once the inaccuracies in the Government's descriptions of the case law and of the record are cleared away, it is apparent that the Government has offered no good reason for denial of the petition. The Government does not dispute that it is an important question whether the prosecutor's "'responsibility and duty to correct what he knows to be false and elicit the truth,'" *Napue v. Illinois*, 360 U.S. 264, 270 (1959) (quoting *People v. Savvides*, 136 N.E.2d 853, 854 (N.Y. 1956)), applies to false testimony on cross-examination. Similarly, the Government does not deny the importance of the second question presented in the petition, which focuses on whether a prosecutor's failure to correct false testimony requires a new trial if there is any reasonable likelihood that the false testimony could have affected the verdict. The Government acknowledges that "[t]he 'reasonable likelihood' standard is more favorable to the defense than the 'reasonable probability' standard." Br. Opp. 12. The Government argues once again, contrary to the record, that this is not an appropriate case to decide the correct standard because "Donaldson's falsehoods were disclosed at trial." Br. Opp. 11. As discussed above, the District Court's findings establish that some of his falsehoods were never revealed to the jury.

4. The Plain-Error Issue Warrants Review.

This Court also should resolve the conflict between the Court of Appeals' decision and the Second Circuit's decision in *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994). *See*

also United States v. Santiago, 238 F.3d 213, 215 (2d Cir. 2001), *petition for cert. filed* (U.S. Apr. 19, 2001) (No. 00-9553). Although the Government asserts that materiality was not seriously contested at trial, Br. Opp. 19, the Court of Appeals specifically noted in its discussion of the materiality issue that petitioners had "put on a vigorous defense." Pet. App. 18a.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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